

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments presented, the Appeals Board finds and concludes as follows:

- (1) An administrative law judge may conduct a preliminary hearing as a part of a post-award review and modification proceeding.

The Appeals Board has on several occasions approved use of preliminary hearing procedures as a part of a post-award application for review and modification. The Board has done so, however, largely based upon the fact the parties have treated the proceedings as a preliminary hearing and for the most part the Board has done so without further explanation. See Bahr v. Link, Inc., Docket No. 199,140 (March 1996); Meeks v. Farha Quarterhorses, Docket No. 135,085 (August 1995); Gillis v. Havens Steel Company, Docket No. 112,383 (September 1995). This appears to be the first incidence where a party has directly challenged the authority to conduct a preliminary hearing in a post-award matter.

Respondent argues there is no statutory authority for a post-award preliminary hearing and points to the following language in K.S.A. 44-534a, as amended by S.B. 649 (1996), the preliminary hearing statute:

"Upon a preliminary finding that the injury is . . . compensable. . . , [t]he administrative law judge may make a preliminary award of medical compensation . . . to be in effect pending the conclusion of a full hearing on the claim" (Emphasis added.)

For several reasons the Appeals Board has concluded that the preliminary hearing procedure may be used in the post-award proceeding. First, the above quoted language from K.S.A. 44-534a, as amended by S.B. 649 (1996), was not, in our opinion, intended to limit the use of preliminary hearings. Instead, it was intended to indicate the final award would supersede any preliminary hearing order. Application for review and modification reopens the hearing. Second, policy justifications for preliminary hearings before an award continue to exist after an award. The need for a prompt resolution of issues relating to medical care and temporary total disability benefits may be as urgent after an award as before. Finally, the Act contains at least one example where the legislature expressed the authorized use of a preliminary hearing procedure after an award. K.S.A. 44-556 authorizes the use of preliminary hearing procedures under K.S.A. 44-534a to enforce rights to medical treatment while a case is pending on appeal before the Court of Appeals. Also, K.S.A. 44-551 authorizes use of a preliminary hearing to enforce payment of medical benefits while a case is pending before the Appeals Board.

By affirming the use of a preliminary hearing procedure after an award, the Appeals Board understands it is ratifying a practice which has existed and been followed by the practicing attorneys, generally, as evidenced by the above-cited cases. The practice is one which, in our opinion, is consistent with the statutory scheme and applicable policy considerations. The Administrative Law Judge did not, therefore, exceed his jurisdiction

in this case by conducting a preliminary hearing as a part of a post-award review and modification proceeding.

(2) Because this claim is being treated as an application for preliminary hearing, the Appeals Board does not have jurisdiction to consider respondent's argument that the evidence does not support a finding that claimant is in need of medical treatment or temporary total disability benefits.

K.S.A. 44-551 limits the jurisdiction of the Appeals Board. The Appeals Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the administrative law judge exceeded his or her jurisdiction. This includes specific jurisdictional issues identifying K.S.A. 44-534a. A contention that the Administrative Law Judge has erred in his finding that the evidence shows a need for medical treatment and temporary total disability benefits is not an argument the Appeals Board has jurisdiction to consider.

(3) The order for payment of attorney's fees is made pursuant to K.S.A. 1990 Supp. 44-536(g) and is a final order.

An award of attorney's fees is considered a final award. See Shirley v. Vulcan Materials Company, Docket No. 165,635 (Sept. 1995). The Appeals Board follows a practice of conducting hearings on all cases involving final award. That portion of this preliminary hearing Order relating to attorney's fees will, therefore, be set for oral argument at a later date.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge John D. Clark should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Richard L. Nicklin, Wichita, KS

Douglas C. Hobbs, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director